No. 98-1509

IN THE
Supreme Court of the United States

COLUMBIA UNION COLLEGE,
Petitioner,

v.

EDWARD O. CLARKE, JR., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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Seeking to disguise important and clearly defined constitutional issues as premature and factbound, the Commission overlooks a fundamental point. The Commission does not challenge the holding below that its actions presumptively violated Columbia Union's Free Speech and Free Exercise rights. It is against this background—not present in the antiquated precedents relied upon by the Commission—that two clearly framed issues of national significance need clarification by the Court.

First, the petition calls upon the Court to explain the current significance of the distinction it has drawn between permissible "indirect" and impermissible "direct" aid programs to religiously affiliated institutions of higher education. As the Commission would have it, the point of this constitutional inquiry is to determine whether stu-

dent fingerprints can be found on aid checks. On the other hand, Columbia Union submits that the question is whether an aid program viewed as a whole may include religious participants where the criteria for participation are secular and wholly neutral toward religion, and the state aid is ultimately distributed on the basis of the choices of individuals. The answer to this basic question resolves the entire case, regardless of anything that might occur on remand.

Nothing better illustrates the confusion in the appellate courts over this fundamental matter than the decision in *Jackson* v. *Benson*, 578 N.W.2d 602 (1998), *cert. denied*, 119 S.Ct. 496 (1998). The Commission labors to distinguish *Jackson*, and in doing so only highlights the wooden formalism to which it must cling in opposing certiorari. In *Jackson* the Supreme Court of Wisconsin held that "the importance of our inquiry here is not to ascertain the path upon which public funds travel under the amended program, but rather to determine who ultimately chooses that path." *Id.* Confronted with *Jackson*, the Commission now advances as the constitutionally principled demarcation the difference between mailing an aid check reflecting a student headcount directly to a school and mailing the same amount of aid in a bundle of checks that parents are legally mandated to endorse for payment to the school. Columbia Union is hard pressed to think of a better illustration of why clarification from the Court is badly needed.

Second, the petition calls upon the Court to answer the question whether categorizing religiously affiliated institutions on the basis of whether they are "pervasively sectarian" is an enterprise that should remain part of First Amendment jurisprudence. The stakes are high. Under the Commission's view, *Roemer* demands that institutions

labelled "pervasively sectarian" be presumed untrustworthy to honor restrictions channeling government aid to secular areas of their operations, no matter how an aid program might be structured. Institutions placed on the other side of the divide—such as the Catholic colleges in Maryland —find these presumptions reversed and enjoy substantial funding advantages.

Whether *Roemer*'s binary distinction should continue to apply after *Agostini* is an urgent and important question. Even if an all-or-nothing category made sense in an era during which "no aid at all" could go to a pervasively sectarian institution, that era is now over. After *Agostini*, questions about what *type* of aid may go to religiously affiliated institutions remain ripe for decision no matter what the result of the "pervasively sectarian" analysis—except, apparently, when the questions involve institutions like Columbia Union, which did not receive the benefit of this Court's later decisions in the district court and court of appeals because its situation was deemed to be "directly controlled" by the old *Roemer* plurality decision.

After *Agostini*, there is no longer any doctrinal justification for the pervasively sectarian test in the context of a neutral aid program. This Court should therefore evaluate whether it should remain part of the law in view of the collateral damage it does to other important constitutional values. First, academic and other institutions must undergo the type of religious investigation called for by the remand here. Second, invidious discrimination by government decisionmakers is encouraged, as bureaucrats are forced to employ amorphous and subjective standards to unfamiliar religions, facing constant temptation to fall back on their own preferences and prejudices. Finally, enormous pressure is placed on religious institutions themselves to alter their religious message to avoid the dreaded

"pervasively sectarian" label, which assures them of exclusion from important benefits readily given to their secular (or even other religious) competitors.

What is the proper distinction between permissible and impermissible aid programs that include religiously affiliated institutions of higher education? Does the pervasively sectarian distinction still make any sense? On these fundamental questions the Opposition has nothing to say. The Court needs to tell us whether—as the dissent below concluded—its "later Establishment Clause cases have so undermined [*Roemer*] that it is no longer good law," at least in the context of a higher education program of the type presented here. *Agostini* v. *Felton*, 117 S. Ct. 1997, 2007 (1997).

What the Opposition *does* say in response to the petition provides no reason for denial:

1. It is beyond question that this Court has the jurisdiction to review interlocutory petitions pursuant to § 1254(1). And the Court often does so. *See, e.g.*, *Marquez* v. *Screen Actors Guild, Inc.*, 119 S. Ct. 292, 297 (1999); *Hughes Aircraft Co.* v. *Jacobsen*, 119 S. Ct. 755, 760 (1999); *Swidler & Berlin* v. *United States*, 118 S. Ct. 2081, 2090 (1998). This is warranted where there is "a clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 196 (7th ed. 1993).

Certiorari review is even more appropriate here because it is the remand itself that constitutes an important part of the constitutional violation Columbia Union seeks to avoid. Even in the context of assessing the finality jurisdictionally required for review of state court decisions, the Court has found review appropriate where the subsequent proceedings "would themselves deny the federal right for the vindication of which review is sought in the Supreme Court." *Supreme Court Practice, supra,* at 104, *citing Colombo* v. *New York*, 405 U.S. 9 (1972) (double jeopardy); *Helstoski* v. *Meanor*, 442 U.S. 500 (1979) (speech or debate clause). Here, as explained in the petition, the very remand ordered below violates the First Amendment.[1]

2. The Commission contends the remand poses no significant threat to constitutional freedoms because its inquisition will be "narrow," focusing "only" upon such matters as how courses are taught, how faculty are hired, and how students are selected. Opp. 11. This is like telling a patient that an operation will be minor because surgery will be performed only on the heart, the lungs, and the kidneys. Ironically, academic freedom has been defined in one of this Court's celebrated cases as a college's freedom to decide for itself "who may teach, what may be taught, how it will be taught, and who may be admitted to study." *Sweezy* v. *New Hampshire*, 534 U.S. 234, 250 (1957). These are exactly the areas into which even the Commission acknowledges the remand must intrude.

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[1] The Commission audaciously suggests it is Columbia Union that has somehow changed its position in arguing against the remand. To the contrary, *both* Columbia Union and the Commission opposed any further discovery when the notion of a remand was raised for the first time during oral argument at the court of appeals. Pet. App. 33a-34a. Indeed, it merits repeating that the *Commission* had earlier disclaimed any intention to conduct on-campus investigations of the type it now supports, recognizing that such an investigation would *create* legal problems. Pet. App. 105a. The Commission's new-found enthusiasm for the remand is just a convenient basis upon which to avoid this Court's review. The Commission chose the record upon which it made its discriminatory decision against Columbia Union, and (as the party concededly bearing the burden of proof) chose to rest on that record at the district court. The Commission should not be entitled now to try and support its decision with after-acquired evidence.

In *Lemon* v. *Kurtzman*, 403 U.S. 602, 620 (1971), the Court held that "state inspection and evaluation of the religious content of a religious organization" may lead to the ultimate "intru[sion] on religion and thus conflict with the Religion Clauses." To call the consequences of the remand "minor"—either for Columbia Union or for the Catholic colleges and other institutions that must now be investigated—is grotesque. The real question is whether this type of intrusion is justified by any substantive constitutional value. That is the question that divided the panel below. This Court should provide an answer now, while the case in is a posture for it to prevent further constitutional harm.

3. The remand the Commission now advocates would do nothing to lessen the task that must ultimately be faced on appeal. The contention that there are "material issues of fact" for resolution at the district court is a fiction, unsupported by the record. Indeed, the panel majority did not even specify what facts—in the sense of objective evidence—might be developed on remand. Rather, the majority found that different *characterizations* of particular undisputed facts about Columbia Union could lead a rational factfinder to different legal conclusions about the institution. Pet. App. 25a-33a. This is the basis upon which it denied summary judgment. There are no legally significant "facts" lacking in the record.

This is not even a situation in which anything could be gained procedurally by a remand to the district court for "fact finding." Any finding by the district court that Columbia Union is pervasively sectarian would be one of "constitutional fact," subject to *de novo* review on appeal. *See, e.g., Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567 (1995); *Bose Corp.* v. *Consumer's Union of United States*, 466 U.S. 485, 509 (1984). *See also Harris* v.

City of Zion, 927 F.2d 1401, 1402 n.1 (7th Cir. 1991), *cert. denied*, 505 U.S. 1229 (1992); *New Life Baptist Church Academy* v. *Town of East Longmeadow*, 885 F.2d 840, 941 (1st Cir. 1989) (each applying *Bose* standard of review in religious freedom cases).

4. The Commission offers no response to Columbia Union's demonstration that this Court's more recent cases would—if applied directly to Columbia Union's participation in the Sellinger program—support judgment for Columbia Union. Comparing Chief Judge Wilkinson's dissent with the panel majority's opinion definitively answers any question as to whether sharp divergences exist on the state of Establishment Clause doctrine in the courts below.[2] Plainly there is a need for this Court's guidance.

All the Commission can say is that, based upon cryptic citations to *Roemer* in later decisions, that case has not been definitively overruled, and can easily be applied by lower courts to the facts before them. But this is nothing more than a rehash of the principles a *court of appeals* should follow under *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989). It does nothing to inform the proper exercise of certiorari review by this Court. Indeed, this Court has never taken the view that so long as an older case has not been definitively overruled, the fact that the courts of appeals understand

[2] The Commission picks at technicalities to distinguish the cases with which the decision below is in conflict. It dismisses *Hartnett* on grounds the aid there was insubstantial, yet that aid included cash payments from a federal agency. It dismisses *Catholic University* based upon comments from a concurring opinion, yet the majority in that case barred judicial review of a *secular* tenure decision on grounds that it would intrude upon protected First Amendment activity. More important, in evaluating the certworthiness of this case there is no reason to search for a case raising "identical" issues. The point is that the *principle* of the decision below is of recurring significance, and has divided courts in a wide variety of contexts.

they are constrained to apply it to the facts before them is a barrier to certiorari review.

For example, in the recent case of *State Oil Co.* v. *Khan*, 118 S. Ct. 275 (1997), the court of appeals described the basis of the *per se* rule against maximum retail price fixing of *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968) as "wobbly and moth-eaten" in light of more recent precedents. The court below nonetheless understood that its job was limited to the routine task of applying that case to the facts before it absent further action by this Court. There was of course no conflict below. Yet this Court did not hesitate to grant certiorari so that it could bring antitrust law into harmony with more recent developments by overruling *Albrecht*.

The real question here is not whether a remand might produce more facts against which the *Roemer* line of cases could be applied. The real question is what should happen to an older rule of constitutional law where more recent doctrine has overtaken it. *Agostini* demonstrates that such a question is *especially* appropriate for certiorari review so that practical harm to education may be avoided. Otherwise colleges stand to spend thousands of hours and dollars satisfying bureaucrats and courts as to whether they are "pervasively sectarian." In *Agostini*, notwithstanding significant procedural difficulties not present here, Justice O'Connor observed that "it would be particularly inequitable for us to bide our time waiting for another case to arise while" educational dollars were wasted in complying with a rule that was no longer valid. 117 S. Ct. at 2018-19.

5. This is not the factbound *Roemer redux* depicted by the Commission. In the twenty-three years since *Roemer*, this Court has established in *Witters* that neutral higher education programs can include religious participants; it has established in *Agostini* that even pervasively sectarian

primary schools need not be cut off from all government aid; and perhaps most importantly, it has established in *Rosenberger* that religious organizations have a right under the First Amendment not to be excluded from neutrally available government programs on the basis of viewpoint discrimination.[3] The important question for decision is how those principles should apply *today* to a program employing neutral secular criteria, in which funding is apportioned on the basis of student attendance choices and funds are restricted to secular uses.

Respectfully submitted,

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[3] Columbia Union has already been found to enjoy a constitutional right under the Free Speech and Free Exercise Clauses to participate in the Sellinger program. The Commission has not taken issue with the Fourth Circuit's findings on this point and cannot now do so. *See* Rule 15.2. This case is therefore a particularly good vehicle for clear presentation of the question of how Free Speech and Free Exercise rights are to be harmonized with Establishment Clause requirements in the context of aid to higher education.